IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 25, 2006 Session

STATE OF TENNESSEE v. FESTUS BABUNDO

Appeal from the Criminal Court for Bradley County
No. M-05-271 R. Steven Bebb, Judge

No. E2005-02490-CCA-R3-CD - Filed May 25, 2006

The defendant, Festus Babundo, appeals from the judgments of the Bradley County Criminal Court, which, pursuant to his guilty pleas, convicted him of felony possession of cocaine with intent to sell and misdemeanor possession of marijuana and sentenced him to a suspended, effective sentence of eight years. Prior to submitting his guilty pleas, the defendant moved the trial court to suppress evidence seized during a police officer's search of the defendant's vehicle. After the trial court apparently denied the motion to suppress, the defendant filed written guilty pleas, "reserving a certified question of law." Following the entry of judgments, the defendant filed a timely appeal. The state has requested that this court dismiss the appeal because no certified legal question was properly reserved for appellate review. Because the state is correct in its claim, this court is without jurisdiction, and the appeal is dismissed.

Tenn. R. App. P. 3; Appeal Dismissed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

James F. Logan, Jr., Cleveland, Tennessee, for the Appellant, Festus Babundo.

Paul G. Summers, Attorney General & Reporter; David E. Coenen, Assistant Attorney General; Jerry N. Estes, District Attorney General; and Dorothy Atwell, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In November 2004, a Tenth Judicial District drug task force officer stopped the vehicle driven by the defendant on Interstate 75. The officer testified that the defendant had been following a tractor-trailer truck too closely. Following the officer's discovery that the defendant had no valid driver's license and the defendant's consent to a search of the vehicle, the officer found marijuana inside the vehicle and cocaine on the ground near the vehicle, where the officer had seen the defendant bending "toward the ground." Pending trial on a two-count indictment, the defendant

moved to suppress the evidence garnered as a result of the detention and search, alleging that he had violated no laws prior to the detention and that the detention and search were the results of "illegal racial profiling" and were accomplished "for the purpose of an exploratory search." The trial court apparently denied the motion to suppress following an evidentiary hearing.[1]

On October 3, 2005, the defendant submitted written guilty pleas, "reserving a certified question of law."

On October 4, 2005, the trial court entered standardized judgments. The judgment on count (1) (the misdemeanor) recited that the guilty plea was "pursuant to Rule[s] 11(e) . . . and 37(b)(2)(i) [of the Tennessee Rules of Criminal Procedure,] and the certified question is whether the trial court acted properly in overruling the defendant's motion to suppress and in evaluating the evidence therein." The judgment for count (2) (the felony) merely recited that the conviction was "subject to certified question of law in case # 05-271."[2]

On October 25, 2005, the defendant filed a notice of appeal.

On November 22, 2005, the trial court entered an order which, after reciting that the defendant's motion to suppress had been overruled in open court, stated:

> Thereupon, the Defendant entered into a plea agreement under Rule 11(e) but explicitly reserved, with the consent of the State and the Court, the right to appeal a certified question of law, pursuant to Rule 37, that is dispositive of the case, and the following requirements are met: (a) a certified question of law reserved by the Defendant for appellate review is whether the Trial Court acted properly in overruling the Defendant's Motion to Suppress and in evaluating the evidence presented in reaching the judgment so stated; (c) the question is expressly reserved with the consent of the State and of this Court; and, (d) it is the opinion of the Defendant, the State and this Court that the certified question is dispositive of these cases.

Now on appeal, the state has requested through its brief that the appeal be dismissed.

Reserving a certified question of law for appellate review is governed by Rule 37(b)(2) of the Tennessee Rules of Criminal Procedure. It provides,

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[1] The record contains no written order denying the motion to suppress, but the transcript of the hearing indicates such action by the trial judge.

[2] Both counts comprise case number 05-271.

> An appeal lies from any order or judgment in a criminal proceeding where the law provides for such appeal, and from any judgment of conviction:
>
> . . . .
>
> (2) *Upon a plea of guilty* or nolo contendere if:
>
> (i) The defendant entered into a plea agreement under Rule 11(e) but explicitly reserved with the consent of the state and of the court the right to appeal a certified question of law that is dispositive of the case, and the following requirements are met:
>
> (A) The judgment of conviction, or other document to which such judgment refers that is filed before the notice of appeal, must contain a statement of the certified question of law reserved by the defendant for appellate review;
>
> (B) The question of law must be stated in the judgment or document so as to identify clearly the scope and limits of the legal issue reserved;
>
> (C) The judgment or document must reflect that the certified question was expressly reserved with the consent of the state and the trial judge; and
>
> (D) The judgment or document must reflect that the defendant, the state, and the trial judge are of the opinion that the certified question is dispositive of the case[.]

Tenn. R. Crim. P. 37(b)(2)(i)(A), (B), (C), (D) (emphasis added).

Appeals of certified questions of law run counter to the general rule that a defendant enjoys no right of appeal following a guilty plea. *Compare* Tenn. R. Crim. P. 37(b)(1) *with id.* 37(b)(2). Perhaps for this reason, our supreme court firmly rejected a rule of substantial compliance, *see State v. Armstrong*, 126 S.W.3d 908, 912 (Tenn. 2003), and instead demanded strict adherence to Rule 37(b), as that rule has been amplified by the court itself. For instance, in *State v. Pendergrass*, our supreme court "emphasized" that

> [r]egardless of what appeared in prior petitions, orders, colloquy in open court or otherwise, the final order or judgment from which the time begins to run to pursue a T.R.A.P. 3 appeal *must contain a statement of the dispositive certified question of law reserved* by

> defendant for appellate review and the question of law must be *stated so as to clearly identify the scope and the limits of the legal issue reserved*. For example, where questions of law involve the validity of searches and the admissibility of statements and confessions, etc., the reasons relied upon by defendant in the trial court at the suppression hearing must be identified in the statement of the certified question of law[,] and review by the appellate courts will be limited to those passed upon by the trial judge and stated in the certified question, absent a constitutional requirement otherwise. Without an explicit statement of the certified question, neither the defendant, the State nor the trial judge can make a meaningful determination of whether the issue sought to be reviewed is dispositive of the case. . . . Also, the order must state that the certified question was expressly reserved as part of the plea agreement, that the State and the trial judge consented to the reservation and that the State and the trial judge are of the opinion that the question is dispositive of the case. Of course, the burden is on defendant to see . . . that the record brought to the appellate courts contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the question certified. No issue beyond the scope of the certified question will be considered.

State v. Pendergrass, 937 S.W.2d 834, 836-37 (Tenn. 1996) (quoting *State v. Preston*, 759 S.W.2d 647, 650 (Tenn. 1988)) (emphasis supplied in *Pendergrass*); see *State v. Lillie Fran Ferguson*, No. W2000-01687-CCA-R3-CD, slip op. at 4-5 (Tenn. Crim. App., Jackson, Apr. 27, 2001) (lamenting general, widespread failure to comply with *Preston-Pendergrass* and citing cases in which court of criminal appeals has dismissed certified-question appeals). Given the mandate for strict compliance, the present "case must be added to the growing heap of appellate fatalities that have resulted when would-be appellants failed to heed the *Preston-Pendergrass* litany of requirements for certified-question appeals." *See State v. Carl F. Neer*, No. E2000-02791-CCA-R3-CD, slip op. at 2 (Tenn. Crim. App., Knoxville, Oct. 8, 2001).

The judgment imposing the defendant's felony conviction did not articulate a certified legal question, but even if we were persuaded that the misdemeanor judgment adequately articulated the question, it is clear that *neither* judgment indicated the consent of the state to a Rule 37(b) appeal or recited that the proposed certified question of law is dispositive of the case. Although a Rule 37(b) appeal may be advanced when the otherwise nonconforming judgment incorporates by reference an existing document that satisfies the terms of the *Preston-Pendergrass* rule, *see, e.g.*, *State v. Chance Coy Herron*, No. M2004-00553-CCA-R3-CD, slip op. 3 (Tenn. Crim. App., Nashville, Dec. 1, 2004), no incorporation appears in the judgments under review. The only pre-judgment documents that articulate a certified question were the guilty pleas, and their contents fail to comply with the standards of *Preston* and *Pendergrass*.

We have considered the efficacy of the post-judgment order, filed November 22, 2005, but determine that it avails the defendant nothing. Although our supreme court authorized the use of a post-judgment "corrective" order to supply the *Preston-Pendergrass* elements missing from a judgment, *see State v. Armstrong*, 126 S.W.3d at 905, 912 (Tenn. 2003), the "corrective" order is ineffectual when filed after the notice of appeal is filed, *id.* The trial court loses jurisdiction to implement "curative measures" once the defendant files a notice of appeal. *Id.*

Because compliance with the requirements for a certified-question appeal is a predicate to the appellate court's *jurisdiction* in a guilty-pleaded case, *see Preston*, 759 S.W.2d at 650, we must dismiss the present appeal.

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JAMES CURWOOD WITT, JR., JUDGE